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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

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SUPREME COURT, U. S.

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, Judges of the United States District Court for the Southern District of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

Opinions Below

The first opinion of the District Court (BICKS, J.), dated November 4, 1960, is reported at 188 F. Supp. 434 (App. to Petition, pp. 49a-55a).

The second opinion of the District Court (DIMOCK, J.), dated December 28, 1960, has not as yet been officially reported (App. to Petition, pp. 88a-92a).

The majority and dissenting opinions of the Court of Appeals, dismissing petitioner's appeals from the foregoing decisions have not yet been officially reported (App. to Petition, pp. 103a-115a).

The subsequent decision of the District Court (CASHIN, J.), dated May 3, 1961, has not as yet been officially reported (App. to Petition, pp. 130a-135a).

Jurisdiction

Petitioner invokes the certiorari jurisdiction of this Court under 28 U. S. C. § 1254 (1).

Jurisdiction of the motion for leave to file a petition for a writ of mandamus is invoked by the petitioner under 28 U. S. C. § 1651 (a).

Questions Presented

(1) Where a District Court, consisting of one judge, enters an order which it has no jurisdiction to enter, and the Court of Appeals, on the ground of lack of jurisdiction, dismisses an appeal therefrom, may a petition for certiorari to the Court of Appeals be granted by this Court?

(2) Conceding, *arguendo*, that the order of temporary abstention, pending action in the State courts for the construction and determination of the validity of a State statute, should have been made by a three-judge District Court, and was, in fact, extra-jurisdictionally made by a one-judge District Court, must this Court compel literal adherence to the procedural requirements as to the proper tribunal pending action in the State courts?

(3) Did the single-judge District Court have jurisdiction to enter the order of abstention and to retain jurisdiction, pending State court action to be commenced and prosecuted to final judgment, as part of the single-judge District Court's function in passing upon a substantial question which necessarily had to be passed upon to determine the existence of a question under the Federal Constitution?

Statutes Involved

Involved in this application are:

28 U. S. C. §§ 1254(1), 1651(a), 2281 and 2284.[1]

Statement

The merits of the instant controversy are not now before this Court; only a procedural question is presented.

Of relevance to the questions presented is the fact that by the complaint herein the petitioner seeks a declaratory judgment determining that certain provisions of New York statutory law, as applied to the petitioner, are violative of the Federal Constitution and are violative of certain Federal statutes and regulations which are assertedly exclusive and pre-emptive in character. The petitioner also seeks a preliminary and permanent injunction of enforcement of the State statutes by the respondents (State officers) against the petitioner (App. to Petition, pp. 13a-14a).

The petitioner applied for the convening of a three-judge District Court under 28 U. S. C. § 2281 and thereafter formally moved for the convening of that Court (App. to

[1] The pertinent provisions of the foregoing are set forth in the Appendix to this brief.

Petition, pp. 32a-34a). The respondents cross-moved for a dismissal of the complaint on the grounds:

(a) No actual controversy is presented;

(b) No cause of action is stated;

(c) No real or substantial Federal question is presented;

(d) The State courts afford a plain, speedy and efficient remedy and the construction of State statutes should first be determined by the State courts;

(e) The State statutes attacked by the petitioner are not unconstitutional;

(f) The District Court lacks jurisdiction over the subject matter because the complaint fails to show that petitioner has been deprived of any right secured by the Constitution of the United States or by any Act of Congress providing for equal rights of all citizens or of all persons within the jurisdiction of the United States (App. to Petition, pp. 42a-43a).

On November 4, 1960 the District Court (Bicks, J.) denied the petitioner's motion for a three-judge Court and held that the threshold issue was whether the Federal Court should accept jurisdiction at this time since the issues have never been presented to or passed upon by the State courts. The Court concluded that, although substantive issues raised in the complaint may not be considered by the judge to whom application is made, it has the power to retain jurisdiction pending State court adjudication where, as here, there is insufficient basis to support intervention by a Federal court of equity (App. to Petition, pp. 50a-55a). The Court did not dispose of the respondents' cross-motion to dismiss the complaint.

The petitioner appealed to the Court of Appeals, Second Circuit, from the determination and order of the District Court (App. to Petition, p. 56a).

Thereafter, while the appeal was pending, the respondents (not as part of the procedure in the instant proceeding, but as the initiating step in an independent investigation of the petitioner's operation) issued a subpoena to examine the petitioner (App. to Petition, pp. 69a-70a).

The petitioner moved in the action for an order:

(a) To quash the subpoena;

(b) To restrain the respondents from harassing the petitioner pending its appeal. The petitioner also renewed its application for the convening of a three-judge District Court (App. to Petition, pp. 57a-58a).

On December 28, 1960 the District Court (Dimock, J.) determined as follows:

(a) Refused to quash the subpoena, but restrained the respondents, pending the appeal to the Court of Appeals, from using the information thereby obtained to interfere with petitioner's operation;

(b) Did not pass upon the renewal of the request for the convening of a three-judge District Court (App. to Petition, pp. 88a-92a).

The petitioner appealed to the Court of Appeals, Second Circuit, from the decision and order of Judge Dimock (App. to Petition, p. 96a).

The respondents moved in the Court of Appeals to dismiss both appeals on the grounds that the orders appealed from were not final decisions and that they were not inter-

locutory orders refusing an injunction (App. to Petition, pp. 97a-100a).

The Court of Appeals, Second Circuit, by a divided Court, granted the motions to dismiss on April 14, 1961 (App. to Petition, p. 116a). The Court (opinion by WATERMAN, J.) disagreed with the respondents that the order of Judge BICKS was not final and hence unappealable. However, they held that the order had the effect of dismissing the complaint.

Since the complaint challenged the constitutionality, under the Federal Constitution, of a State statute and challenged it because of the way that the statute was being applied, it was clear that a three-judge District Court should have been convened. This is the tribunal which deals with constitutional challenges to State activity. If the District Court fails to convene the statutory court and dismisses the complaint the remedy is by writ of mandamus from the Supreme Court.

Before ordering a three-judge court, the District Court does have jurisdiction to determine the existence of a substantial federal question and this question is properly reviewable by the Court of Appeals. But the different question of abstention, pending prior determination by the State courts, is only within the jurisdiction of a three-judge court and this is not reviewable by the Court of Appeals.

Having held that Judge BICKS had no jurisdiction to make the determination which he made, the Court of Appeals decided that it, too, had no jurisdiction to entertain the appeal. Since a three-judge court should have been convened, the Court of Appeals dismissed the appeal. The Court reached the same conclusion on the appeal from

the decision of Judge DIMOCK (App. to Petition, pp. 103a-110a)[2].

Thereafter the petitioner renewed its motion in the District Court for the convening of a three-judge District Court (App. to Petition, pp. 117a-119a), which motion was denied by the Court (CASHIN, J.). The Court stated that the statement in the Court of Appeals' decision as to a three-judge District Court was pure *dictum* and that, since the orders of Judges BICKS and DIMOCK were undisturbed, he was bound by those orders as the law of the case. He suggested reargument before Judge BICKS or application to this Court for a writ of mandamus (App. to Petition, pp. 130a-135a).

Subsequently the petitioner moved the Court of Appeals, Second Circuit, for the recall, clarification and amendment of its prior mandate, but the Court denied the motion without opinion (App. to Petition, pp. 146a-147a).

ARGUMENT

POINT I

Petition for certiorari should be denied either because both Courts below were without jurisdiction, or because, jurisdiction being present, abstention could be ordered by a single-judge District Court.

A. If neither the one-judge District Court nor the Court of Appeals had jurisdiction, a petition for certiorari to this Court does not lie.

The petitioner, in its complaint herein, seeks to restrain the respondents from enforcing certain State statutes

[2] Dissenting opinion of Lumbard, C. J. (App. to Petition, pp. 111a-115a).

against it. It is conceded that, if the only question involved herein were the constitutionality of the State statutes under the Federal Constitution, the District Court would have had no choice but to convene a three-judge District Court (28 U. S. Code § 2281). But the premise for this concession is not present in this case. Constitutionality cannot be determined without a prior construction of the State statutes. State judicial construction in such cases is, of course, the governing principle and is binding upon both the three-judge District Court and this Court (*Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270 [1928]).

In 28 U. S. C. § 2284 it is provided that the three-judge District Court may order its proceedings held in abeyance during the prosecution to final judgment of a *pending* action in the State courts for the construction and determination of the validity of the State statutes. In the instant case there is no pending State action.

Assuming, *arguendo*, however, that the question of abstention was in the exclusive jurisdiction, in the first instance, of a three-judge District Court, as was held herein by the Court of Appeals, citing *Alabama Public Service Comm.* v. *Southern Ry.*, 341 U. S. 341, 350 (1951), in support of the statement, and *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317, 320 (6th Cir. 1958), to the contrary,[3] it would follow, as the Court of Appeals held, that the single-judge District Court was without jurisdiction to enter the order of abstention. It would also follow that the Court of Appeals, too, under such circumstances, would be without jurisdiction to entertain an appeal from such order and would be constrained to dismiss the appeal. That is exactly what the Court of Ap-

[3] App. to Petition, p. 108a.

peals held and did upon the authority of *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10, 16 (1930).

A petition to this Court for certiorari is the very height of futility, because in the *Stratton* case this Court held that if an order of a one-judge District Court, failing to convene a three-judge District Court, is appealed to a Court of Appeals, which fails to correct the jurisdictional error, and review is then sought in this Court of the decision of the Court of Appeals, this Court will reverse the decree of the Court of Appeals and remand the case to that Court with directions to dismiss the appeal for want of jurisdiction. That, however, is exactly what the Court of Appeals has already done.

B. The single-judge District Court did have jurisdiction to enter the order of abstention in the instant case.

As has already been stated, this case does not involve solely the question of constitutionality, but involves also the preliminary construction of the State statutes, as to which State judicial pronouncement must control. On this preliminary question we have only an opinion of the Attorney General of the State of New York (App. to Petition, pp. 21a-24a). No State action is pending to construe or test the validity of the State statutes. Since there must be State action pending to vest a three-judge District Court, under 28 U. S. C. § 2284, with exclusive jurisdiction to consider the question of abstention, it necessarily follows that a one-judge District Court, under the conditions here existing, has jurisdiction to enter any order bearing upon the preliminary question of the existence of a substantial federal question.

Obviously, the one-judge Court cannot pass upon this question in the absence of a preliminary construction of

the State statutes. Therefore, abstention, pending construction by the State courts, is an incident to the performance of the one-judge Court's conceded jurisdiction to determine whether there exists a substantial question under the Federal Constitution. See *Louisiana Power and Light Co.* v. *City of Thibodaux*, 360 U. S. 25 (1959), in which it was held that the District Court (a one-judge Court) properly exercised the power it had to stay proceedings pending a prompt State court construction of a State statute of dubious meaning.

POINT II

The motion for leave to file a petition for a writ of mandamus directing the convening of a three-judge District Court should be denied by reason of the fact that the cause has not as yet reached the stage where constitutionality is the sole question and because, on the assumption that it is within the exclusive prerogative of the three-judge District Court to order abstention, this Court should nevertheless not disturb the status quo at this time. A three-judge District Court can be convened after a State judicial determination has been rendered without prejudice to the rights of the petitioner.

A. The single-judge District Court did have jurisdiction to pass upon all questions preliminary to the question of constitutionality, among which was the question of power to order abstention and to retain jurisdiction, pending the construction of the State statutes by the State courts, in order to determine whether there did exist, in fact, a substantial question under the Federal Constitution.

The same argument which has been advanced under Point I, subd. B, of this brief, in opposition to the petition

for certiorari, applies with equal cogency to the motion for leave to file a petition for a writ of mandamus.

B. Assuming, *arguendo*, that the one-judge District Court did not have jurisdiction to enter the order of abstention, since there is no prejudice to the petitioner as a result of the failure at this time to convene the three-judge District Court, this Court will not now disturb the *status quo*.

Almost identical with the situation in the case at bar was *Green* v. *Clancy*, 350 U. S. 910 (1955). In the cited case action was brought to enjoin certain State officers from enforcing a State statute against the petitioner. Petitioner moved for the convening of a three-judge District Court which was denied by the one-judge District Court. The respondents' cross motion to dismiss the complaint on the grounds that a substantial federal question was not presented, that a plain, speedy and efficient remedy was available in the New York courts, and that construction of the State statute should first be determined by the New York courts, was granted by the one-judge District Court. On the basis of the foregoing this Court denied a motion for leave to file a petition for writs of prohibition and mandamus.

It would seem that there is even more impelling reason in the case at bar for a denial of the motion. In the cited case the complaint was actually dismissed. In the case at bar, even though the Court of Appeals said that the order of Judge Bicks had the *effect* of dismissing the complaint, the fact is that it did not do so. Jurisdiction was retained pending State court construction of the State statutes.

Action in the State courts need not be indefinitely postponed. Petitioner is not at the mercy of the respondents'

decision to proceed or not to proceed in the State courts. The petitioner, itself, can precipitate such action. The petitioner has adequate remedies in the courts of the State of New York by way of action for declaratory judgment, proceeding under Article 78 of New York's Civil Practice Act, and other appropriate actions and proceedings (*New York Foreign Trade Zone Operators, Inc.* v. *State Liquor Authority*, 285 N. Y. 272, 276-277, 34 N. E. 2d 316 [1941]; *Dun & Bradstreet, Inc.* v. *City of New York*, 276 N. Y. 198, 206, 11 N. E. 2d 728 [1937]). Such modes of relief have been held adequate by this Court (*Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 106 [1944]; *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 333-334 [1943]).[4]

Aside from the foregoing it must be observed that since the District Court has retained jurisdiction of the instant cause, the petitioner has not been deprived of such Federal relief as it may be found entitled to to supplement the ultimate determination of the State courts (*Burford* v. *Sun Oil Co.*, *supra*, at page 334).

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[4] The petitioner's objection that State action is inadequate because of the statutory limitation of a stay "for a period not exceeding thirty days" (Alcoholic Beverage Control Law, § 121) is without merit because the District Court, whether one-judge or three-judge, may nevertheless restrain the respondents as an incident of its retention of jurisdiction pending State adjudication of the merits of the case.

CONCLUSION

The petition for a writ of certiorari and the motion for leave to file a petition for a writ of mandamus should be denied.

Dated: Albany, New York, June 26, 1961.

Respectfully submitted,

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APPENDIX

28 U. S. C. § 1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *."

28 U. S. C. § 1651(a)

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U. S. C. § 2281

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U. S. C. § 2284

"* * *

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."